IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

GMS INDUSTRIAL SUPPLY, INC.	)	
Plaintiff,	)	CIVIL ACTION NO. 2:19cv324
v.	)	
G&S SUPPLY, LLC, et al,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

May 19, 2022

BEFORE: THE HONORABLE RODERICK C. YOUNG
United States District Judge

APPEARANCES:

PENDER & COWARD PC
By: William A. Lascara
Jeffrey Dennis Wilson
Jesse Brian Gordon
Daniel Berger
Counsel for Plaintiff

McGuireWoods LLP
By: Robert William McFarland
Micaylee Alexa Noreen
Counsel for Defendants

(Hearing commenced at 1:49 p.m.)

THE CLERK: In the matter of civil case number 2:19cv324, GMS Industrial Supply, Inc. versus G&S Supply, LLC, et al. Plaintiff is represented by William Lascara, Jeffrey Wilson, Jesse Gordon, Daniel Berger. And defendants are represented by Robert McFarland and Micaylee Noreen.

Mr. Lascara, is plaintiff ready to proceed?

MR. LASCARA: We are. Good afternoon.

THE COURT: Good afternoon.

THE CLERK: And, Mr. McFarland, are defendants ready to proceed?

MR. MCFARLAND: Good afternoon, Your Honor. The defendants are ready.

THE COURT: Good afternoon, everyone.

So, we are here for a final pretrial conference in this matter. We're going to -- I'm going to first deal with some of your motions in limine. We'll then talk about the exhibits and the plan forward for that, and then I will talk about how the trial is going to go. So that's how we're going to proceed today.

So, it's my understanding that you-all had a settlement conference on May 17th, I guess a follow-up settlement conference, and you weren't able to resolve it; is that correct?

MR. LASCARA: Yes, Your Honor. Just this past

week, we had a get-together, and we haven't gotten there yet.

THE COURT: Okay. All right.

Okay. And you agree, Mr. McFarland?

MR. MCFARLAND: I do agree, Your Honor. We had a conference with Judge Krask, and the parties have not reached a resolution.

THE COURT: Okay. Very good. All right. Now, let me ask this, I guess, and I hadn't planned on asking this, but is there any reason you can see that I need to call Judge Krask to see if you-all can get back with him? If it's not, it's not, and I'm not pushing it, but just on the way you kind of said things, "That we haven't gotten there yet," that's why I'm asking.

We're still going to go forward with this today no matter what you say, but...

MR. LASCARA: Yes, Your Honor. And we are still hopeful that it could settle. It wasn't possible with where we ended up, but I did have some conversations with Judge Krask and he, you know, gave me his assessment. And I said, you know, if we could get to that point, there is a chance to settle. So, we both agreed that it would be worthwhile not to simply look forward only but, you know, to continue keeping that option open.

THE COURT: Right. I guess I'm asking something

different. So, I'm going to be in trial next week. I guess what I'm asking is: Do I need to place a call to Judge Krask to say, Hey, can you carve out some time for these guys next week? I don't want to waste anybody's time. If I don't need to do that, that's fine. But they have got really busy schedules. So you just calling them might not get it done. But if I call them and say, Hey, these guys really need to get back in, you know, he might be able to carve out some time. I'm not pushing it. Again, I just want to know where we are.

Mr. McFarland.

MR. MCFARLAND: Your Honor, I think what might be most productive, we left with a proposal that I don't think was accepted, obviously, by the plaintiff, but if they want to make a counter proposal and convey that to Judge Krask, I think at this point the parties can work with him just by telephone conference.

THE COURT: Okay.

MR. MCFARLAND: I think we both have the authority of our clients and can interact that way as opposed to trying to bring everyone together when there are more schedules. And then when he's got ten minutes, he can call me and say, Hey, I've heard from Mr. Lascara, and he's conveyed this offer, you know, get back to me with a proposal or whatnot. We can talk that way.

THE COURT: All right.

MR. MCFARLAND: It may be the most productive, efficient way.

THE COURT: Mr. Lascara, you agree?

MR. LASCARA: I have no objection with that approach.

THE COURT: Okay. Very good. All right. So, we'll do that, and then I will leave that to you-all.

So, I'm going to start with these motions in limine. So, the first one -- I'm going to start with defendants' motions in limine first, and I'm going to take them one at a time.

Defendants, I want to hear from the defendants on the motion to exclude argument and evidence that the sales agents owed GMS a duty of loyalty.

MR. MCFARLAND: Thank you, Your Honor. Good afternoon. Robert McFarland for the defendants.

And this motion, Your Honor, with respect to the sales agent -- as the Court is aware, my clients, who are sales agents, are essentially independent contractors. They are not employees of the plaintiff. And so as this Court noted in its denial of the plaintiff's motion for summary judgment, any duties that they owe have to be expressed in that sales agreement. And there is no duty of loyalty in that sale -- in the independent agent sales agreements.

And I'll note for the record, Your Honor, that pretty much every agent's agreement is -- they're similar in wording. So it's not that one has some great difference of duties than another.

I don't find any duty of loyalty in those sales agreements. And what we do note is that what the plaintiff argues is, Well, we pled in the complaint this duty rather vaguely about the sales agents. There is a -- essentially it's -- I may not remember the language exactly, but there is a best efforts clause or a supposed to sell clause. That's not a duty of loyalty.

The duty of loyalty that this Court noted with respect to Defendant Greer is a duty that exists because he was an employee for a period of time. That's different. And both Colorado law and Virginia law recognize that duty of loyalty for an employee.

But there is no duty of loyalty. Unless it's expressed in that sales agreement, there is no duty of loyalty for an independent sales agent. And the fact that plaintiff may have put in some vague language in the complaint about duties doesn't create that duty of loyalty in the contract.

I'll remind the Court that when this claim was first raised by the plaintiff, they tried to argue to this Court that it was an independent duty of loyalty that

existed under common law. Well, that clearly isn't correct. And so now they're trying to say that it exists in the sales agreement, and it doesn't.

And there is -- when you read, moreover -- the operative complaint here is the third amended complaint -- there is no claim specifically that the sales agents breached any duty of loyalty. It's not found there. And we can only defend the claims that have been properly pleaded and that are recognized. And that one, I think, since it's got to be based on the sales agreement, which says that it's governed by Virginia law, they have to be recognized by Virginia law. It's not recognized, Your Honor, and it's something that should not be.

The prejudice is, is that if they get to make some claim about a duty of loyalty for independent sales agents -- and by the way, not only independent sales agents, but non-exclusive sales agents. My clients didn't have to only sell GMS products. They could have sold Laughton products or STIHL products or whatever. They didn't only have to sell for GMS, which is one of the underlying issues with respect to the G&S issue, but we leave that for another day.

But, critically, if it's not in that sales agreement, they shouldn't be up before the jury and trying to argue that, oh, these sales agents, boy, they were

disloyal. They breached a duty of loyalty that isn't there. Now, we can get into the facts of what my clients did, and that's fine, but you can't create -- and I can see the prejudice right now to my clients in trying to create a duty of loyalty that does not legally exist.

THE COURT: Okay. Thank you very much.

All right. Plaintiff.

MR. GORDON: Thank you, Your Honor. Jesse Gordon here on behalf of the plaintiff to address the sales agent duty of loyalty motion in limine filed by the defendants.

I want to start by saying this was already decided by the Court in its memorandum opinion on GMS's motion for partial summary judgment. It held that there was no fraud duty because it was precluded by the source of duty rule because there was a source of duty in the contract to be loyal.

The Court cited *Augusta Mutual* and *Owen versus Shelton*. And *Owen versus Shelton* is the closest case. It says that a real estate broker, a contractor, must act in good faith related to its principal, and it said that that duty is incorporated into every contract. So it could be a -- it doesn't need to be expressed.

But as defendants pointed out, it is expressed in this contract "aggressively promote." The contract says they have a duty to aggressively promote. Testified at

depositions aggressively promote meant best efforts. If you are aggressively promoting and using your best efforts to sell GMS products, then you can't be on that same sales call selling competing products. So, it's expressed in the contract. It can be implied under the law.

So, the pleading, defendants raised that in our opposition we said it was pled. Well, in the original motion in limine it claimed that this was something new, that it hadn't been brought to the Court's attention. So, that's when we went back and looked at the pleadings. There is no prejudice here that they weren't able to conduct discovery.

In the first complaint, June of 2019, and the third amended complaint, they both state the sales agent defendants were under contracts with GMS that required their loyalty, prohibited competitive conduct and solicitation of GMS customers. So, there is no claim that this is new. It was in both complaints. It goes back to 2019.

And finally, Your Honor, we had this -- at the top of the motion in limine, this is not a proper purpose for a motion in limine. This is essentially a motion for summary judgment. It's not an evidentiary decision that the Court needs to make in advance of trial. So, we would request on those bases that the motion be denied and the evidence be admitted of the duty of loyalty of the sales agent

defendants.

THE COURT: All right.

Mr. McFarland, anything else on this?

MR. MCFARLAND: Yes, Your Honor.

We agree that the language and the duty to aggressively promote and what that means and what my clients did, that's fair game. But the duty of loyalty that they're trying to create is otherwise nowhere to be found in the sales agreement. And we note that the allegations that had to do with non-solicitation and confidentiality provisions that supposedly the sales agents owed were dismissed and dropped from the original complaint when the third amended complaint was filed. The only thing that is found in the third amended complaint is that the sales agent defendants failed to aggressively promote the sale of GMS products in his/her territory as required by the sales agreements. That's at paragraph 120 of the third amended complaint. That's it. That claim, again, we'll defend that. That was pled. I think they're going to have a very difficult time on it, since my clients were the leading sales agents for this company, including after G&S was started, but that's fine. We will defend that. That is pleaded. What isn't pleaded is this nebulous duty of loyalty that is for a sales agent non-existent as compared to an actual employee, Your Honor.

And we would ask that this is a proper motion in limine, because otherwise the plaintiff is going to try and create duties and make arguments about terrible things that my clients did, when there is no legal basis for it, and the jury shouldn't hear that.

THE COURT: Okay. Thank you very much.

I think it would have been best to have dealt with this on a motion for summary judgment, but we'll deal with it on a motion in limine.

So, I'm going to overrule the defendants' motion. I think under the low threshold of relevancy under Rule 402 that it comes in, and not that it's not prejudicial. I mean, everything that is going to come in against both sides is prejudicial. It's whether the prejudice substantially outweighs any probative value, and so, you know, based on that -- and I don't find that that's the case. So, based on that, I'm going to overrule that motion.

All right. So, defendants' second motion in limine is to exclude testimony or argument about GMS witness Amber Wenrick. And so before I hear from you on that, Mr. McFarland, is that the witness that you filed the motion about last night about using the deposition?

MR. LASCARA: Yes, Your Honor.

THE COURT: Okay.

MR. LASCARA: A full deposition was taken, and we

did have agreements to present her through de bene esse deposition --

THE COURT: Yeah.

MR. LASCARA: -- for subsequent testimony. Then she deployed, and then they filed this.

THE COURT: Okay. Very good.

All right, Mr. McFarland. I'll hear from you.

MR. MCFARLAND: Thank you, Your Honor. Actually, my colleague, Ms. Noreen, is going to argue that one, Your Honor.

THE COURT: Okay. Very good.

MS. NOREEN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. NOREEN: I think the first issue that this Court needs to address that was raised in GMS's opposition brief is which standard this should be resolved under. I don't see any significant difference between the standard under Virginia law versus the standard under Federal Rule 604. They both require that the witness be able to recall things that should be within their personal knowledge. And in this case, Miss Wenrick does not have the capacity to recall, which is required under both Virginia law for competency and required under the Federal Rules for competency, and I think that's pretty well laid out within the briefing, Your Honor.

THE COURT: You said 604 or 601?

MS. NOREEN: I believe it's 604. 601, I apologize.

THE COURT: 601?

MS. NOREEN: Yes, Your Honor.

THE COURT: That's what I thought.

MS. NOREEN: Yes, Your Honor. I apologize for that. Yes.

THE COURT: Looking at my evidence book just to make sure. Go ahead.

MS. NOREEN: It is 601.

And under both of those standards, again, a witness must be able to have the capacity to recall and testify truthfully about things within their personal knowledge, and they have to have personal knowledge of that.

Miss Wenrick testified during her deposition that she suffers from both short and long-term memory loss and that she was seeking medical treatment for that. And of course, for HIPAA reasons we didn't probe further -- probe her further on that issue. But that comes after about 75 percent of her deposition had already been taken, and she had indicated at the very beginning of her deposition that there was nothing that would prevent her from testifying fully and accurately. And we learned that later that that was not quite the case.

I think it's also worth noting --

THE COURT: Did you cross her about her memory when you were taking her deposition, when you had the deposition?

MS. NOREEN: When we followed up with her -- and I believe Your Honor has the deposition transcript, and certainly you're more than welcome to look and see for yourself, but about a little bit between halfway and three-quarters of the way through her deposition, we stopped the deposition and questioned her about her inability to recall --

THE COURT: Okay.

MS. NOREEN: -- because it was so apparent that she was having difficulty in that area. So many of her responses were that she could not recall.

THE COURT: Okay.

MS. NOREEN: And it was at that time, late in her deposition, that she disclosed her short-term and long-term memory loss. And, again, for HIPAA reasons the questioning on that issue was fairly brief about her medical history related to that.

She was asked issues significant to this case and many of which she could not recall were extremely important and central to this case. Whether or not she signed an employment for GMS is a fundamental basic fact that she should know. Whether or not she got paid a bonus from G&S. What types of sales she made for GMS. These are all things

that she testified that she could not recall.

I will also note for the Court that before we were aware of her memory loss, most of the questions were phrased, Do you recall, ma'am? And of course, if she answers no to one of those questions, in hindsight we know now that it could be that her answer is no because that is the true and correct answer, or the answer is no because she could not recall.

I think it's also worth noting for the Court the case -- one of the cases that plaintiff had cited to, *Turnbull*, I think is directly on point to this issue. In *Turnbull*, Mr. Tolley testified in court. He testified to significant facts around the same time of the issues at issue in that case of events that had happened approximately 18 months before. He testified extensively on direct examination, the Court said. And there were certain things that he was not able to recall, and the Court voir dired him on those issues and precluded his testimony further. And I think that is very similar to the circumstance we have here and something that the Court should take very close note of.

There are significant issues with her testimony. Certain things she could recall and, like in *Turnbull*, certain things she could not recall, all things that are extremely relevant and important to this case. And, again, like in *Turnbull*, the witness was presented with a document

that they had written and could not recall having penned, and that is true with Ms. Wenrick's testimony. She was presented with text messages between her and one of the defendants, and she couldn't recall ever having written, received, or anything about those messages. She was also presented with notes of conversations that she had with the plaintiff, and she couldn't recall any of those conversations or details of those conversations.

And I think, Your Honor, in light of the unavailability of the witness, that just makes her deposition testimony even more prejudicial to the defendants, because this Court, unlike in the *Turnbull* case, is not going to have the opportunity to voir dire her or question her further about the issues in this case.

Her testimony on many of the issues is questionable at best. There are many things that she cannot recall, and she is not going to be questioned further, and I think that creates a really big problem. So we ask that this Court exclude her testimony because she is not a competent witness.

THE COURT: All right.

MS. NOREEN: Thank you, Your Honor.

THE COURT: Thank you very much.

Plaintiff, I'll hear from you.

MR. LASCARA: Yes, Bill Lascara for plaintiffs.

Your Honor, I think that, as we indicated in our response, the key issue here is that she didn't admit that she had a memory loss that was constant, that it was irretrievable, that didn't allow her to recall. So, the first point I want to make is that they've stated Miss Wenrick's memory loss prevents her from recalling dates, numbers, faces, events, and details of events. But what she actually said was, "But, yes, I do have long-term" -- this is a quote -- "But, yes, I do have long-term and short-term memory loss, so that would prevent me from giving you dates if I can't remember them. It can prevent me from dates, numbers, and details of events."

So, it is not a pervasive and all -- she never testified it was pervasive or all encompassing short-term and long-term memory loss. And in fact that's proved by the deposition transcript itself. They gave an example. I think they took 110 times that they said she was, quote, "either was unable to recall, or did not know the answer to questions posed to her." So they went through the transcript, and they counted 110 times where she said either I don't recall, or I do not know. They haven't broken it down. I couldn't break it down by going through it. So, we know that the 110 times includes irrelevant information, because if you don't know, you don't know. It's not a matter of recalling. They gave 25 examples. And, you know,

as we went through the examples, many of them were about minute details that occurred over two years ago.

Now, I'm getting on in years, and I know that it's difficult for me to remember whether I communicated with someone in a phone call or a text message or email that occurred two years ago, but in fact that's one of their examples, and we cite that on page 7 of our brief.

The question that was asked was referring to an answer by Miss Wenrick of "I don't recall."

Miss Wenrick was asked, quote, "How did you convey that? Did you call Miss Robichaux or email her?"

And she didn't recall, but it's because that occurred over a long time ago. So, many of these are de minimus.

Probably more importantly, taking the scope, because I believe, Your Honor, the jury that sits in that jury panel are the best people to determine what credibility to provide to this witness who may not recall everything. But if you look at the questions that were asked, 709 questions, and 110 times, even if you assign all 110 times as being "I don't recall" as opposed to "I don't know," that's still a recall rate of 84.5 percent. And it's kind of throwing the baby out with the bath. You have a witness who can answer 85 percent of the questions, and the jury can determine whether those were credible answers, or because

she didn't answer the other 15 percent, they're not credible. And, again, I would assert that 15 percent is probably a wrong number since that included "I don't recall" and "I don't know."

There is really, I think, a clear motive here, Your Honor. She said some very damaging things to the defendants' case. And it will be demonstrated that her only contact, her supervisor, the only person that ever supervised her -- she was brand new to this field. She had never done this before. And Westly Greer was the one that taught her everything. Westly Greer is the mastermind behind all of this case, all of the hidden concepts. And so there is testimony in that transcript, and we mention this in the brief, that he basically told her, Yeah, you can sell for GMS. These are NSNs. And the sister company has non NSNs, individual parts that don't come in these NSN form, and those get sold through the sister company. He then also told her in the end, Well, if you think that they're going to read your emails or texts, you should destroy them. That's part of the transcript. It's a text message. It's one of the exhibits to the transcript. So there is some very damaging information that she testifies about in there, and I think that's the real reason that they are asking you to keep a great deal of factual information away from the jury.

The application of law, we do see that there is a basis for the application of Virginia law, and there is a slight difference under the Virginia law. The standard is a witness has the capacity to testify if he or she understands the question posed, is able to formulate intelligent responses, and understands his or her responsibility to tell the truth. That is a case, *Helge versus Carr*, 212 Va. 485, a 1971 case.

There are comments in the Charles E. Friend, Law of Evidence in Virginia that we cite where there is reference, "A witness must understand the questions posed, be able to formulate" --

THE REPORTER: I'm sorry.

THE COURT: You've got to slow down. My court reporter can't keep up with that.

MR. LASCARA: I apologize.

THE REPORTER: Thank you.

MR. LASCARA: I started reading and that's...

So there is some indication that the ability to recall is included in the Virginia standard. So I'm not sure there is a big difference there, but we believe that clearly she meets both standards. And we would ask, Your Honor, that the jury in this case be the decision maker as to her credibility and that this motion in limine be denied.

THE COURT: All right.

Defense, Ms. Noreen, I'll give you the last word if you want to add anything.

MS. NOREEN: Thank you, Your Honor.

And I'll note for the Court that Miss Wenrick has some testimony that's quite favorable to our side, but first she needs to be competent to testify, and that's really what is at issue here today. Mr. Lascara cited to some percentages and numbers, and, frankly, whether Miss Wenrick stated specifically 110 times she didn't know or could not recall doesn't quite encapsulate the breadth of her testimony which indicates that she doesn't have any memory.

And I hate to go back to the *Turnbull* case, but in that case, his testimony came two years after the events that occurred, and he was unable to recall because of memory loss, exactly the same issues and exactly the same period of time at issue for Miss Wenrick. And your inability to recall if you have memory loss is affected, even -- especially over a period of time, whether that be short-term, long-term, or both.

And I'll also note for the Court, or I guess remind the Court from our briefing, that Miss Wenrick testified that she couldn't recall things that had happened the week before. She couldn't recall what day of the week she had prepared for her deposition, which is something, you know, that certainly time isn't going to have quite as big an

effect on. She was able to recall certain things from the period of time specifically at issue in this case, but there was plenty that she was not able to recall about that exact same time period, and that's really the issue. And the *Turnbull* case speaks to that.

And her deposition testimony is more difficult, I think is made more difficult to use that testimony because she is not going to come to court, and she is not going to testify live here based off of her memory now, and that creates a significant problem.

The standard under Virginia law, just to touch on that again for one moment, the *Turnbull* case, again, makes it clear that the inability of a witness to recall testimony falls within their ability to formulate intelligent responses. Under that standard, again, I think we largely agree that the standards are the same, but under both Federal Rule 601 and under the Virginia rules there must be the ability to recall, and Miss Wenrick just simply does not have that as a result of her medically diagnosed short and long-term memory loss. So we ask that she be precluded as incompetent, Your Honor.

Thank you.

THE COURT: All right. Thank you.

All right. I am going to overrule the motion. I did look at the testimony. I did believe that you have

crossed her on this issue of her memory. And she admits having short and long-term memory loss and has some problems with dates, numbers, and faces. But I also viewed that she answered various questions regarding her work with the defendants and even leading up to some of the events in the complaint. So, from my standpoint, I think it's proper impeachment, which it seems like you did, and would be proper argument to the jury about whether or not any of her testimony should be believed. So, from that standpoint, I'm going to overrule your motion.

All right. Defendants' third motion in limine, motion to limit GMS's unfair competition claims to the CCPN kits displayed in its October 2017 catalog.

So, Mr. McFarland or Ms. Noreen, I'll hear from you on that.

MR. MCFARLAND: Thank you, Your Honor.

This, Your Honor, in this motion we're asking that what the jury hear in terms of evidence be for the unfair competition claim those products that allegedly were in competition.

The Court has heard that there are really two types of sales that can be made here, or two types of products, the NSN, which are the National Stock Number sales, which are the vast majority of the plaintiff's revenues and profits. Those are not at issue in this case. My client

has never sold NSNs. It doesn't have an NSN number.

But from what we've seen through the pleadings recently and some deposition testimony, notwithstanding that Mr. Gorken admitted in the preliminary injunction hearing that his case was not about NSNs -- Judge Smith asked him pointedly, and he said nope. When asked directly by Judge Smith at the preliminary injunction hearing whether the intrusion into GMS's business model was about CCPN sales and not NSN sales, Mr. Gorken confirmed NSNs are a different entity altogether.

So what we're saying is the evidence here needs to be limited to allegedly competing CCPN sales. And in that respect, what it needs to be is what CCPNs was GMS really offering customers for sale? And the way you determine that is what's in its product catalogs. And the relevant product catalog is the product catalog that came out in 2017, that was in effect up through the time of my clients' termination in April of 2019. So what's in there that they were offering their customers is fair game. That is something that they can allege. I'm not sure how they're going to prove it, but they can allege and try to put on evidence that those products were -- they made them available to their customers and could have sold them.

What they should not be able to do is: A, try and say that somehow my clients' CCPN sales affected NSN sales,

because they clearly don't -- they're entirely different -- and try and use catalogs that they created after they terminated my clients, and then they deliberately put in things that they weren't offering for sale because of my clients. That is absolutely misleading. And I know, as Your Honor noted, evidence is usually going to be prejudicial to the party who didn't put it in, but that's unfairly prejudicial because it's misleading and confusing.

What this claim needs to be limited to, the unfair competition claim, is: What were you, GMS, offering as CCPNs to your customers that you could have sold? I mean, it got to the point where Miss Robichaux in her deposition testified, Well, we could have offered anything. It doesn't matter if it's in our catalog. It doesn't matter if we've never offered it before. Well, that can't be the standard. That's not a proper evidentiary basis. It really needs to be limited to: What is it you were offering that the defendants are also selling? That's all we're asking for here, Your Honor, and I think it needs to be granted in that respect.

THE COURT: All right. Thank you.

Okay, Plaintiffs.

MR. GORDON: Thank you, Your Honor.

We've got kind of a few issues kind of all swimming together here. The first one I see is -- objection, at

least by the defendants -- is can G&S offer evidence of competition between these NSNs and the CCPNs. And in terms of jury confusion, waste of time, or unfair prejudice, we are going to cross this bridge anyway.

The defendants have a defense that they were rightfully selling the NSNs and then selling CCPNs that were non-conforming. So this is all going to get explained to the jury. It's part of everyone's case. So, to the extent that anyone is worried about the jury, they're going to hear it.

G&S recognizes -- I'm sorry -- GMS Industrial, the plaintiff, recognizes that the defendant did not have these NSNs. They weren't selling them. They didn't have them during their existence. But that's not the only way that something can compete. If GMS, if the plaintiff has an NSN that has three paper towels, and G&S, the defendant, is selling one individual roll of paper towels as a CCPN, those could be competitive items, and that I think is something for the jury to decide. It's also relevant to the trade secrets. G&S, the defendant, was creating kits that were modeled on the NSNs. So they used the trade secrets there to compete. So, again, the evidence is going to come in. It is relevant to those factors. Because it is relevant, because it is not unfairly prejudicial, that should come in.

The second issue that I hear here is about the

catalogs and when the catalogs come out. And, again, we resolved this with Judge Smith at the TRO hearing. This same objection was lodged. Now, it was only to one April catalog, not to two later catalogs. And she held that that would be proper cross-examination, that the plaintiffs could explain when the catalogs came out, if the items shifted. For example, the later catalogs show that GMS, the plaintiff, could sell through FedMall, so that they could sell individual items, which is what the defendants were just talking about, about Miss Robichaux saying they could sell more things than just what was in the catalog.

So there could be testimony, yes. Does it say that there is FedMall in the later catalog? Yes. Was that always a capability? Yes. So, it doesn't bar the testimony.

And everyone, I believe, recognizes that the GMS sales force had the ability to sell items that were outside of the catalog. That's not a disputed item. So, how can they be limited to the items that were in the catalog?

In the motion in limine, there was an argument about a failure of disclosure, that what was in the catalog and when things were sold wasn't disclosed. Again, this was an issue that Judge Smith solved. That Exhibit 13 from the TRO hearing, it was revised to include when the items were sold, or when GMS began selling the items, what the item

number was. And it even disclosed what items were in the catalog. So, again, there is no reason to exclude these catalogs. Everything has been disclosed. There is no unfair prejudice. And we believe defendant's motion in limine should be denied.

THE COURT: All right.

Mr. McFarland, I'll give you the last word.

MR. MCFARLAND: Thank you, Your Honor.

Your Honor, with respect to the catalogs, we start with relevance. There is simply no relevance in what GMS has in its catalogs after my clients were terminated. Judge Smith held that my clients could absolutely sell and compete as long as they didn't do so using improper means and with trade secrets. So, what is in a catalog after April 2019 is totally irrelevant. And the fact is that GMS deliberately put things in its catalog after April 2019 that it didn't have in there before to try and make the argument they are making now, that is, Oh, no. We're really competing on these things.

What is at issue here is: What was GMS selling as to CCPNs? It doesn't matter if they could sell it. They could sell rocket ships. That isn't what is at issue in this case.

What this jury -- and this is going to be confusing to a jury. A jury can certainly be told on what is an NSN

sale and what is a CCPN. And they are going to get that, I have no doubt, very easily.

But NSN sales are simply not at issue in this case. My client can't sell NSNs. What is at issue in this case, in the best scenario for the plaintiff, is what CCPNs it had in its catalogs that its customers could buy, and that's what this motion is asking this Court to limit to.

I'll also note this idea, Well, we ought to be able to talk about our NSNs and what's in the NSN, because if the NSN has -- to use Mr. Gordon's example -- if the NSN has three paper towels, and the customer only wants one, maybe that is competitive. No. As a practical matter, I don't think it is. But more importantly no one, not a fact witness, and critically not an expert has testified that NSNs compete with CCPNs, or that CCPNs compete with NSNs.

There is no -- no expert is going to come in and say, I've done a market study. I've analyzed these products. I've looked at the military industrial goods sales issue and, yes, NSNs really do compete with CCPNs. It's not there. And this would be presentation of pure speculation. There is no evidence to support it.

This client still, the plaintiff still can't point to a single sale that it actually lost because of my clients, not a one. And at the least what I'm asking this Court to do is to make sure that we have the jury hear the

actual evidence of what was at issue in this case, CCPN versus CCPN, and CCPN that was in the catalog when my clients were still sales agents for the plaintiffs.

THE COURT: All right. Okay. There is something I want to read before I decide this, so I'm just going to take this one under advisement and then come back to it.

All right. Defendants' motion to exclude evidence and argument of GMS's damages with one exception.

MR. MCFARLAND: Thank you, Your Honor.

This goes to what damages should the plaintiff be able to present to the jury. And at this point here is what I think, based on the Court's rulings and the claims that are actually pleaded and the law, here is what I understand and what we've asked the Court to limit the plaintiff to.

With respect to Mr. Gorken, there is a claim in Count 1 that he breached his duty of loyalty, and the Court has held so far that under Colorado law, Colorado law does permit the employer to try and recoup what has been paid for salary and bonuses and that, so that's fine. What isn't acceptable under Virginia law is the idea that they can recoup the commissions that were paid to the sales agents for GMS sales. Number one, Virginia law does not recognize any such type of recoupment, and particularly when what we're talking about is not trying to recoup commissions for the clients' -- my clients' competing sales. They're for

sales that they made for GMS that GMS received the revenues for. That's the only reason my clients got the commissions. And under the law, you can't recoup those.

The plaintiff tries to argue that it's permitted under this great principle and agency doctrine and fiduciary duty, but, again, any such claim would have to be governed by their sales agent agreements, which apply Virginia law. And the cases that the plaintiff cites to are all real estate cases where a real estate broker is representing a client and does something improper, and in that sense has to disgorge a commission.

My clients are independent non-exclusive sales agents. The only duties they owe are those duties that are expressed in their written sales agents' agreements. And the idea that you can claw back the commissions that have been earned for sales for you is unsupported factually, practically, and by the law, Your Honor. So that's an element of damages, and we don't think it should ever be presented to the jury as even a possibility.

Then, Your Honor, what the plaintiffs are entitled to in terms of compensatory damages is what they can prove are the losses that they sustained because of my clients' sales that were unfair competition or through the misappropriation of trade secrets. I think there is going to be a tremendous, tremendous evidentiary problem with

that. But I will say, sitting here now, before we start the trial, what they can establish for compensatory damages for misappropriation of trade secrets or unfair competition is fine. What you look to there is: What were my clients' sales? And they have that evidence. They know what G&S Supply sold during its short existence. It's about $500,000. But then what they have to do is they have to prove, it is their burden to prove that but for some tortious conduct by my clients, they would have had those sales, and that's where I think there is going to be a real evidentiary issue. But I will acknowledge that at this point in time that's an element of damages.

That's it, Your Honor. The rest of these nebulous things that are out there are just not permissible under the law and shouldn't be presented to the jury.

THE COURT: Thank you, Mr. McFarland.

All right, Plaintiff.

MR. LASCARA: Thank you, Your Honor.

As it relates to damages in a motion in limine context, I just want to review the standard, and it comes out of the *Intelligent Verification Systems, LLC versus Microsoft* case, finding a motion in limine is not an appropriate vehicle for addressing the strength of evidence and the substance of a complaint. I think Your Honor recognized this in a recent opinion in the *Gonzalez versus*

SeaWorld Parks matter and cited for that proposition, but also, and I think importantly, Your Honor, for the proposition that a motion in limine should be granted only when the evidence is clearly inadmissible on all potential grounds.

And here, Your Honor, we do believe that disgorgement is appropriate under certain circumstances, and I think you've already found that with respect to Mr. Greer, but we also believe that it extends beyond Mr. Greer. And we're thankful for the opportunity to have submitted sur reply, and I'll get into that in a moment.

But it seems very clear that G&S's position is that, quote, "GMS failed to produce any evidence that it sustained actual losses as a result of the defendants' wrongdoing." And that statement is simply not true, and we have identified, I think, clearly while there are many counts, and it can get confusing because there are different methods of recovery for the counts that still remain in this case, our position is very clear that disgorgement is an appropriate remedy under the Virginia law. And we have set this forth, I think, pretty clearly in the five-page memorandum first starting with the *Augusta Mutual* case, I believe that Your Honor had cited, and the *Owen versus Shelton* case, the price -- I quote, "The price of violation of the duty to disclose is forfeiture of the broker's right

to compensation. This rule illustrates the high regard the law holds for the fiduciary relationship founded, founded as it is upon one man's trust in the integrity and fidelity of another. The purpose of the rule is more prophylactic than remedial. It is designed not to compensate the principal for injury, but rather to discipline the fiduciary in the conduct of the office entrusted to him." So, Your Honor, that case was a 2007 case, but Virginia law -- in Virginia law, this principle is well established.

We cite to a 1919 case, *Schmidt versus Wallinger*. There the Virginia Supreme Court noted, quote, "The broker, who in disregard of his duty, conceals adverse interests or secretly enters into the service of, or himself becomes an adverse party forfeits his right to commission."

And that's where we are in this case. These folks were going out there into the marketplace. They had a list of products with GMS in one catalog. Frankly, they could sell anything that the government wanted, but the first opportunity for sale is: Here is our catalog. Look at what you want, and we'll get it to you. And here is the G&S catalog. When they offer both of those catalogs as their method of marketing, they violate their duty to aggressively promote and their duty of loyalty.

And this long string of cases starting in -- with at least 1919, in *Schmidt versus Wallinger*, says under

Virginia law you can be penalized as well as the plaintiff can be remunerated by a clawing back of the commissions.

There is also a case, *Bell versus Routh Robbins Real Estate.* It is a 1966 case. And the Supreme Court then noted, "The crucial question presented in this appeal is essentially whether the evidence establish as a matter of law the defendant salesman and agent breached his fiduciary duty which a broker owes to his client, thereby causing a forfeiture of the real estate commission."

The distinction that Mr. McFarland tries to make that, oh, well, these were real estate cases, I think it is a distinction without a difference. There is no limiting factor in there. And so we believe that there is good law, and that there is reason for Your Honor to follow it in that line of cases.

They have cited the *Geneva Enterprises versus Bavely* case. That's a Virginia Circuit Court case that's not binding. The position entirely ignores the purpose of the agent commission forfeiture as a prophylactic result. But even if the case did apply, Your Honor, we point out that specific bad acts here did lead to the damages. In other words, they went in. They sold competitively every time they went in to make a sale. And they had the obligation, when they were going to get paid for sales they made for us, to write out the information that resulted in

their sale and their entitlement to commission. And there was the perfect opportunity to reveal to us, yeah, we made this sale, but we also made this competitive sale over here, and they failed to do that every time they asked us for a payment.

So the failure to disclose the competitive sales is critical and a breach of the duty of loyalty that we say applies not only to Westly Greer, but to all of the sales agents who Your Honor has found have that duty of loyalty implied into their contract and as the reason for the source of duty rule decision Your Honor made in eliminating the fraud charges. And so that finding dictates, I believe, that this rule of damages applies.

There is some discussion that Ms. Van Tassel, the expert, withdrew it, withdrew this measure of damages, but that's not true at all. Miss Robichaux, who is lay expert witness, is prepared to testify about all of those commissions paid to them, and the details of how they responded with their forms talking about and receiving the entitlement to payment without disclosure that they were selling competitively each time. And that testimony was not coming in through Ms. Van Tassel, who will be here and will testify about damages, but not about this specific set of damages.

So, Your Honor, we believe that the law entitles us

to the disgorgement, and we ask that their motion in limine be denied.

THE COURT: All right.

Mr. McFarland, I'll give you the last word on this.

MR. MCFARLAND: Thank you, Your Honor.

The huge distinction between the real estate broker cases that Mr. Lascara relies upon and this situation is there is no fiduciary relationship between the independent non-exclusive sales agents and the plaintiff. So there is no -- there is no fiduciary duty there, and so you can't claw back. I mean, it's almost mind boggling the concept here.

They're claiming that my clients, the one duty that they have is to aggressively promote. I acknowledge that. That's what's in their sales agent agreements. My client -- so the claim is: You didn't aggressively promote. But yet what you're trying to take away are the sales that they made, the commissions for the sales that they made. That is just diametrically opposite, Your Honor. Moreover, legally it is unfounded. There is no legal principle under Virginia law that would let you claw back a commission you have already paid for a sale that the person made to you in this relationship as an independent non-exclusive sales agent. And their own damages expert originally posited that contention or that theory and withdrew it.

And now what I hear Mr. Lascara saying is, oh, we're going to put it on through Ms. Robichaux, who he called a "lay expert witness." I don't think such a creature exists under the evidentiary rules. You can be a lay witness --

THE COURT: We'll see when we get to trial if he can make that under Rule 701.

MR. MCFARLAND: Well, she hasn't been identified as an expert, Your Honor.

THE COURT: Okay.

MR. MCFARLAND: I understand she can be a fact -- I understand she can be a fact witness.

THE COURT: Right.

MR. MCFARLAND: And I will acknowledge there are certain opinions a fact witness can do, but I'm pretty sure there is no hybrid fact/expert witness.

So, this one, Your Honor, is a matter of law that these commissions are out, should not even be presented to the jury. And this goes to what my concern is about this trying to create a duty of loyalty that doesn't exist.

This Court acknowledged the only duty of loyalty for that independent sales agent is in the contract. I understand the Court's ruling earlier on my first motion in terms of relevancy. But I'm very concerned. What is the plaintiff going to present? I mean, duties are duties, and

duties are either legally created by common law and so recognized, or duties are created by contract and so stated. And I have real concerns that we're going to be proffering duties that this Court has said can only be found in the contract.

But in terms of this, Your Honor, in terms of damages, the commissions, uh-uh, they should not be permitted to even argue to the jury that they can claw back those commissions.

Thank you, Your Honor.

THE COURT: All right. So, as it relates to this motion in limine, the motion will be denied.

So I've reviewed these opinions. And the 2021 opinion that's cited for the proposition that Virginia law rejects recoupment of salary paid to disloyal employees is a Virginia Circuit Court decision, but not a Virginia Supreme Court decision. There are other cases from the Virginia Supreme Court that support the denial of this motion in limine based on the relationship between the agents and the principals. Also, the Virginia Circuit Court opinion deals with an employer/employee relationship as opposed to what we have in this matter, which is an independent sales agent is not an employee. So that motion is overruled.

So, now we get to plaintiff's motion in limine, and plaintiff has a motion in limine to preclude defendants from

presenting evidence related to a 2007 lawsuit, I believe, *Gorken, et al versus Drummond.* So I'll hear from you on that.

MR. GORDON: Yeah. Thank you, Your Honor.

You know, in about ten days we're going to come down here. We have eight days to try one case. If *Drummond* is coming in, we're going to have to try two. *Drummond* is not relevant under 401. It doesn't have a tendency to make the existence of a fact or consequence more or less probable, because *Drummond* was different.

After the termination, GMS and Mr. Gorken were plaintiffs in a lawsuit for a dec action. It alleged breaches by *Drummond,* and it sought to determine their rights. The agreement was different from the agreement in this case. There may be similarities, but to the extent that they're different -- and we're talking about *Drummond* -- are we going to have to take time to show both agreements to the jury? This is what's at issue here. This is why this is different. These are the facts from the *Drummond* case. These are the facts from the present case.

The defendants say that it's relevant to the contention that G&S sales would not have gone to GMS, but GMS admitted that -- G&S, the defendant, admitted that all of its sales were to GMS customers. So if all of its sales were to GMS customers -- and that was Mr. Greer's response

to interrogatory 15 -- if all of those were sales, then it's really not relevant as to whether those sales would have gone to a third-party. There is no allegation that some third-party would have gotten these sales. They would have either gone to GMS or G&S. The salesman showed up and gave them the two catalogs. It went to one of the two salesmen that he went to sell for.

So the defendants are going to look for admissions in the pleadings that they claim are relevant and try to make the plaintiffs look like hippocrates. You know, you did this 12 years ago. You left your company.

And, again, we're going to have to spend more time going into the facts of the *Drummond* case and explaining why, why it's not applicable. That could lead to jury confusion.

This is a complex industry. I think the Court has already recognized that. So the unfair prejudice would outweigh it.

We cited in the brief the *Bland* case. There, there was an excluded allegation of harassment outside of the workplace. So it was a similar allegation, but since it didn't happen in the workplace, it was unfairly prejudicial. We think that's similar.

There also is a request that the counterclaim by *Drummond* be admitted, and clearly that would be unfairly

prejudicial. *Drummond* is not here to be crossed. It's going to come in. It's going to be in that ECF format with the Court's header on the top. Clearly, the jury is going to consider this as more persuasive than other, other issues.

There is a block quote in the opposition to the motion in limine filed by the defendants, and I think if we look at it, we can understand why *Drummond* was different or why it's not probative. So the quote -- it's on page 4, Document 257. It says, "Drummond is engaged in a highly competitive industry selling common chemical and industrial cleaning products."

Whether the issue is highly competitive or not or the industry, it doesn't matter. You would want to have a non-compete in an industry that's highly competitive. I don't think that's an issue in this case.

Common chemicals. You can compete whether the product is common or complex. You can still have competition. It's just a question: Are they the same?

Products that are readily available from other suppliers. The products may be available from other suppliers, but our issue here is: Did you use the confidential supplier list to acquire your products? So, just because the products are widely available, this statement in *Drummond* isn't relevant to the current case.

Then it says the products were state -- the customers were state and federal government entities. That's broader than we've got in this case. It also says that some of these customers could be made from reviewing public documents of solicitations from state and local entities. And that's not what we have here. What we have here is in-person sales, not bid items.

So, again, this block quote that they are saying is relevant and would be an impeachment or evidence that would be relevant to this case clearly is different. It's inapplicable. It's not relevant under 401. It doesn't make any of the facts in our case more relevant, and it is prejudicial. Its probative value is substantially outweighed by the prejudice. It's not just that it's harmful, but that the prejudice outweighs it.

THE COURT: All right.

All right, Defense, either Mr. McFarland or Ms. Noreen.

MR. MCFARLAND: Your Honor, the statements from the *Drummond* case are directly relevant to this matter. Fourteen years ago the plaintiff in this case, GMS, and Gary Gorken and Rachel Gorken, in pleadings that are filed in this court, made statements to the effect of -- and it's the same industry, Your Honor. Mr. Gordon is trying to distinguish because he says, Well, there is word about state

and local governments.

We took Gary Gorken's deposition. He acknowledged *Drummond* sells the same products that GMS sells to the same customers. And so what happened? In 2007, Mr. Gorken wanted to go out on his own, and so he filed a dec action because he was concerned, and sure enough he had actually received a cease and desist non-compete letter from *Drummond*, his former employer, and accusing him of doing certain things.

And what does he say? In 2007, when it suited his needs he said, This industry, you're selling basic products. What matters is the customer's relationship with the salesperson. There is no trade secrets.

Things he is literally saying to this Court now that are supposedly trade secrets and aren't, but that he represents are, he said in 2007 were not trade secrets.

This jury absolutely needs to hear in assessing this gentleman's credibility and his wife's what he said in 2007 to this Court in a different case, and we are entitled to absolutely present that evidence, Your Honor. It also does go to the damages --

THE COURT: Well, what out of the lawsuit do you want to present? Are you asking can you cross on him on this or --

MR. MCFARLAND: Yes. We can take the complaint

that is a public document that was filed in this court and cross-examine him on it.

THE COURT: Right. But do you want to -- are you asking the Court to cross him on it? Or are you asking the Court to affirmatively present this evidence in your case in chief?

MR. MCFARLAND: I am saying that I get to use the statements in the complaint.

THE COURT: Right. I'm asking you something different.

Are you asking can you cross him on what he said, as it relates to this industry in 2007?

MR. MCFARLAND: Yes.

THE COURT: Or are you asking can --

So that's yes.

Are you also asking can you affirmatively put evidence of this 2007 case into evidence apart from cross-examining him?

MR. MCFARLAND: The complaint should come into evidence, yes, Your Honor.

THE COURT: So that's yes. Okay. Go on.

MR. MCFARLAND: That's a yes.

The complaint in which he made these statements, which are clearly statements against interest now, because they wholly contradict what he's saying in this case, should

come in. They also do go to the issue of damages because they refute the idea that every sale that my clients made would have been made by GMS.

In fact, Mr. Gordon wholly overlooks what the evidence shows is that the sales that G&S made were sales that GMS would never have made, because they didn't want to be engaged in selling one-off-type products. So -- and I'm saying that to the Court, because I think there is going to be a real issue that as opposed to having to put on proof of evidence of sales and competition, they're just going to want to brush over that and assume it.

But it is relevant when Mr. Gorken has testified or stated under oath in a verified complaint that these things, no competition in terms of -- the competition occurs through the sales agents, no trade secrets, not using confidential information; that the jury gets to hear. Now, the jury may think there is a difference here, and he may be able to explain it.

And this is not going to be trying two cases. I wholly disagree with that.

THE COURT: I can guarantee you that we're not going to try two cases.

MR. MCFARLAND: And I agree, Your Honor.

THE COURT: Everybody can take -- if there is one thing you can take away from this hearing, we will not under

any circumstances try two cases.

Go ahead.

MR. MCFARLAND: And I agree, Your Honor. It is not my position that we are going to be trying two cases.

What we do get to do is to test this gentleman's credibility and veracity with what he is claiming in this case that 14 years ago he told this Court were not trade secrets, competition is good, I ought to be able to compete and do whatever I've done.

And the case law absolutely supports us on this, Your Honor. In fact, the case that I'm fairly familiar with, because it was tried by my partners up in Richmond before Judge Payne, the *DuPont* case addresses this. With reluctance the Fourth Circuit reverses and says that they should have been -- the defendant should have been able to put on evidence of trade secrets that are public nature, which is part of what will happen here with Mr. Gorken.

THE COURT: All right, Plaintiff.

I'm sorry. Is that all, Mr. McFarland?

MR. MCFARLAND: I think that will cover it, Your Honor.

THE COURT: Okay. Thank you very much.

Plaintiff, I'll give you the last word.

So why can't he cross your client based on those statements made back in 2007?

MR. GORDON: Why can't he? Again, it's the prejudice issue, Your Honor, that this is --

THE COURT: Right. It's all prejudicial. I'm saying why can't he cross him on statements, if the statements have relevance to what he may have said about things in this industry at another time?

MR. GORDON: Right.

THE COURT: Why isn't that proper cross-examination?

MR. GORDON: Well, for starters, it was 14 years ago. So, do statements made 14 years ago about an issue -- the complaint says that they could find the customers in the phone book.

THE COURT: What Rule of Evidence says you can't use statements from 14 years ago, or 10 years ago, or 5 years ago? Point me to that rule.

MR. GORDON: I mean, I guess we would argue that it was 402, that the probative value is substantially outweighed by the prejudicial effect; that would be the issue. And then the issue that it's not relevant. It doesn't show -- it's just different.

As counsel said, he said --

THE COURT: I understand that the case may be different. I guess I'm saying something different about --

MR. GORDON: Right.

THE COURT: -- not that the case is not different, I agree with you on that, which is why I made my statement we're not going to try two cases. I'm talking about statements that may have been related to the industry that may Venn diagram itself over onto this case, where I may have said something about how a certain widget performs 14 years ago, and that I should be able to be crossed on that.

MR. GORDON: That's where I get into the two cases. Mr. McFarland is going to get up here and give the 10,000-foot view and the snippets out of the pleading, and then we're going to have to spend the time giving it the context. And we're going to have to unwind it. You know, you said in this pleading that these are common cleaning products. All right. Well, what were the -- in 2007, 2009, whatever year, 14 years ago, what were the products of GMS? What were the products of Drummond? What were the sales methods? What, trade secrets did they have? What trade secrets do you have? How was it different?

So it's going to be a waste of time. The jury is going to be hearing about two different cases, and it's going to be used to try and shame the plaintiffs.

THE COURT: What about what Mr. McFarland says about the *DuPont* case?

MR. GORDON: Yeah. So if you read *DuPont*, my

understanding, the facts are a little cursory in the opinion. In the second trial, they asserted that there were trade secrets that were stolen, and in the first trial they disclosed the trade secrets. So in the second trial, they said, Well, you haven't protected your trade secrets. You offered them into the public record, and you put them on PACER or ECF, so you've waived any protection. So, in that case there was an issue in case number two that was directly relevant to the first case. It wasn't some habit evidence or that you acted the same way that you acted in the prior case. And there also was an expert witness that had been an expert in the prior case, so they wanted to ask him about his testimony in the prior case. So that's what happened in *DuPont*. So *DuPont* is different from here, where we've got two cases 14 years apart.

Additionally, defendants stated that GMS didn't want these sales. That's why we're coming down here. I mean, if we're going to spend days on who wanted these sales and whether GMS could make those sales, what products it offered, what products it wanted its salespeople to sell, what percentage of its sales were NSNs versus CCPNs -- so, to just argue and state that this should be excluded because GMS didn't want these sales is putting the cart before the horse.

THE COURT: All right.

MR. GORDON: Thank you, Your Honor.

THE COURT: Thank you.

So, I'm going to take this one under advisement until the trial, and we're going to see how the trial unfolds and whether it's proper impeachment or not. But, you know, I will say this. Even if I decide that there is a statement from the 2007 case that is proper impeachment, it's going to be limited. We're not going all into this other case and what may have happened or what. It's going to be, you know, very limited. Like, you know, I kind of said if I made a statement about this YETI cup in 2007, that this YETI cup was purple, and now I'm saying in, you know, 2020 that the cup is bronze, I think that's proper impeachment. But we're not going to get into when did I get the YETI cup, and who is YETI manufactured by. We're not going there. So, you know, I say that in an advisory sort of way. I'm not making my mind up on the impeachment part of it or on it coming in, in the defendants' case in chief or for their counterclaim, but I will take it under advisement right now. I will see how the trial unfolds.

Let me look at one thing, and then we'll go forward. One moment.

All right. So I've ruled on everything except the plaintiff's motion in limine, which I'm just tabling until we actually get to trial, and then on this issue that deals

with the CCPNs and the NSNs, and I will get back to you on that one before trial, but there is a thing or two I want to look at. So, that's that.

So, now I think that deals with all of the motions in limine that were filed. Is that correct, Plaintiff?

MR. LASCARA: Yes, Your Honor, we believe so.

THE COURT: Mr. McFarland, is that correct?

MR. MCFARLAND: Yes, Your Honor.

THE COURT: Okay. All right. Okay. So I've looked over the pleadings, and I noticed that there are a number of objections to exhibits, designations, witness testimony, et cetera. So, here is how I'm going to handle that. I'm not going to listen to each one of those today, but I'm going to issue an order that will probably come out either later today or tomorrow that's going to say the following. I'm going to order that you-all meet and confer on all of these objections in person and see if you can resolve any of them, because it's been my experience in the last three or four trials that I have had that a number of these get resolved as they go along. So rather than kind of wasting everyone's time, mine, I want you-all to sit down and try to work these things out.

Now, if you're not -- what you're able to work out, that's great. And I'm going to have you file a joint memorandum saying defendants' objection to Plaintiff's

Exhibit 6 is hereby resolved and, you know, it either comes in, or plaintiff is not offering it.

For those that you're not able to resolve, and this will be in my order, I want you to identify the exhibit by exhibit number, identify what the exhibit is, you know, if this exhibit, Plaintiff's Exhibit 6 is a contract between John Doe and Jane Doe. We'll just use defendant as an example here. What defendants' basis for the objection is, and not just relevance, hearsay. Relevance under 403 and what prong under relevance is not met, or what prong under the business record exception is not met.

And then, Plaintiff, you respond with why you think it comes in. It does meet the business record exception, because we have a certificate under Rule 90, whatever, 1 that, you know, that meet all of the elements of the test of 803(6).

And all of that should be in a paragraph. That's not like a three-page thing. That's a paragraph stating exhibit number. This is what the exhibit is. This is why we object to it under this Federal Rule. This is the element that's not met under that rule. This is why we say it comes in, Judge, because it meets the test, and this is why that element that they're objecting to is met. That's what I need for all of the objections going forward, and I'm going to rule on them. All right. And this will all be

laid out in my order.

Plaintiff, any questions about what I'm expecting?

MR. LASCARA: No, Your Honor.

THE COURT: Mr. McFarland?

MR. MCFARLAND: No, Your Honor. I believe we understand well.

THE COURT: All right. Very good. Very good. And I'm going to give you-all until Wednesday at noon to have that done.

All right. So, let me spend a few minutes just talking about how the trial is going to go. So, we're scheduled to start the Tuesday after Memorial Day, May 31st, 2022, at 9:30. You-all should be here at 9:00 o'clock just in case there is something, I need to take the bench and, you know, we need to discuss before I bring the jury in, because I don't want to keep the jury waiting.

All right. So, once I bring the jury in, I will welcome them with a few introductory remarks. My courtroom deputy will then call the roll.

I'm in the process of reviewing your voir dire, and it's my intention to cover all of the areas that you-all raise. I may not ask the question the way you posed it, because there is a standard voir dire I have that covers many matters, but then there will be a section in my voir dire that deals with some case specific things, which is

really what I'm looking to your voir dire for to do that. So, that's that.

So, after voir dire, you-all will do your strikes. It will be three for the plaintiff and three for the defense. And so I do strikes a little bit different than what you may have been used to in Norfolk before. So, it's my understanding that when it gets to strikes, what would happen is the courtroom deputy would put the names on the board. You-all would get the board and switch the board back and forth. That will still happen. But what I'm used to, and what I'm going to do is when it gets to the point of selecting the jury, she's going to select those nine names out of the hat or the bucket or whatever, because we're going to have nine jurors, and those nine will come to the jury box. And then you-all will do the same thing with your board. Start with plaintiff. You will do your strike. You might strike one, you know, plaintiff's one. Goes to Mr. McFarland. Let's say you strike one, all right. So you-all have struck two jurors. The seven that you did not strike are on the jury. There is no back-striking. So then those two will be removed from the panel, and she'll call up two more names, John Doe and Jane Doe, and they'll come in the box. You'll get the board back.

Plaintiff, if you pass on them, they're on the jury.

The board comes to you. If you strike one of them or both of them, they both come out, and we'll put two more in. And then it's the same thing until we have got our nine.

So, really it's the same thing you-all have done in Norfolk before, except in Norfolk you-all typically don't call the nine to the jury box. I call the nine to the jury box because I like to keep up with who is in there and, you know, based on some things that have come out in voir dire. That's what I've done in Richmond over my career as a trial lawyer, and that's what I'm comfortable with, so that's what we're going to do.

So, again, no back-striking. I think that's the same as you-all have always done it.

While you-all are doing the strikes, I'm going to give preliminary instructions. I like to do that for two reasons. One, so that we don't waste time with a lot of dead space. And, two, it doesn't keep the jurors focussing on you so much when you're going over your paperwork and conducting your strikes. That's the standard opening statement, closing statement, rules of evidence, objections, closing argument, that sort of thing.

Right now I am not going to require that people wear masks, but this is a day-by-day thing with the numbers going up in COVID. By the time we get to your trial, it may

be that I require everyone to wear a mask. It could be a situation where, you know, the Chief Judge makes a call about you can't just use one courtroom anymore, and that may have an effect on whether we are even able to go forward. But right now we are able to go forward. We are able to use one courtroom. Right now I'm not making everyone wear a mask, but I could change my mind about that depending on where we are with the COVID numbers.

Any of you -- I know there is, at least for the young lady with the memory issue, I know that that's a deposition de bene esse where she's not going to be present. Any depositions or any type of video evidence that you want to use for somebody speaking, you should have a transcript of that as well to hand out to the jury so that they can follow the testimony. It will be entered as an exhibit, but it will not go back to the jury room, because the evidence will be what is played on the videotape, but it's just an aid so that the jury can follow along with the testimony. And I have you enter it so that if there is an issue on appeal, it's been entered into evidence, and the Court of Appeals can consider it. And I don't make my court reporter try to transcribe when the video is playing, so that way there is some record of it. All right.

What I typically do is on closing argument, I let you-all have the last word since you've been fighting it

out. So, I will read the instructions at the close of evidence, except the last jury instruction. Then I'll let you-all make your arguments. And then after your arguments are concluded, I will read the last instruction, which will be, Now, ladies and gentlemen, it's your duty to go back to the jury room, and your first order of business will be to select a foreperson. And so I will read that jury instruction.

Another thing I do different, which is something I learned during COVID, and I'm sticking with this policy, is that I give each juror a copy of the instructions. That way they're not trying to pass them around and know what negligence means or something. Everybody has a copy of the instruction, and they can look at it, and it aids their deliberations.

All right. So, that's how I think the trial is going to go.

Plaintiff, any questions about anything I've said?

MR. LASCARA: Your Honor, do we need nine copies, or can we put it up on a screen that they will see?

THE COURT: Nine copies. You know, and I guess I'll say -- and I have seen this in another trial that I had -- if you have closed caption of what the person is saying, then you don't need the transcripts. It's just so they can follow along and hear what somebody is saying, but

if it's not closed captioned on the actual video, then you need nine copies, a copy for each juror.

MR. LASCARA: All right. Thank you.

THE COURT: Okay. Mr. McFarland, anything?

MR. MCFARLAND: Yes, Your Honor, thank you.

Two questions. I want to make sure I understand the strikes.

THE COURT: Yes.

MR. MCFARLAND: So you're going to put nine names on the board?

THE COURT: Yes.

MR. MCFARLAND: And the Court's intention is to seat nine?

THE COURT: Yes.

MR. MCFARLAND: And there are no alternates. If all nine are here at the end of the trial, they will all deliberate?

THE COURT: Yes.

MR. MCFARLAND: So when it goes to the plaintiff, and let's say that there is someone initially that he wants to strike, so it's P1?

THE COURT: Yes.

MR. MCFARLAND: And then it comes to me?

THE COURT: Yes.

MR. MCFARLAND: Do I -- let's say there is two

people that I am inclined to strike.

THE COURT: Yes.

MR. MCFARLAND: Do I do both at the same time, or do I do one and then give it back to the plaintiff, and then I'll get another chance to strike?

THE COURT: Right. No. So you will -- if there is two you want to strike, you strike them then.

MR. MCFARLAND: Okay.

THE COURT: Because the board will go back to the plaintiff just so he can see who you struck. And then it comes to Ms. Jones. She will remove those three from the panel and put three new ones.

MR. MCFARLAND: Okay. So I could theoretically then need -- if I thought these were folks for whatever reason I didn't want on the jury, I might need to use all of my three strikes before I see the plaintiff strike his second or third person?

THE COURT: Yes. So the plaintiff will have to do -- when the plaintiff gets the board initially, he has to do all strikes on that nine that's in the --

MR. MCFARLAND: Oh, he's going to have to do all?

THE COURT: Yes.

MR. MCFARLAND: Okay.

THE COURT: So anybody that's of the nine, he's going to have to strike right then, okay. Then it will go

to you. Let's say he strikes one. Then it will go to you, and you strike two, but you don't strike somebody that he would have struck, that person is on now. So he has to exercise his strikes on that nine when he gets the board.

Do you understand what I'm saying?

MR. MCFARLAND: I do now, yes.

THE COURT: Yes.

MR. MCFARLAND: Yes. Okay. Thank you, Your Honor.

And with respect to the use of deposition testimony, both parties have designated deposition testimony that they want to play to the jury.

THE COURT: Yes.

MR. MCFARLAND: Mostly I think it's -- well, Miss Wenrick aside, and we're using a discovery deposition. I don't know that that's video.

Is it?

MR. LASCARA: Yeah. It was, Rob.

MR. MCFARLAND: Okay.

MR. LASCARA: We didn't present the video to the Court yet, just the hard copy.

MR. MCFARLAND: But there are objections that both sides have, and I take it that those need to be resolved as well, Your Honor?

THE COURT: Yes.

MR. MCFARLAND: Before the trial?

THE COURT: Yes. That's part of the objections and the exhibits, right, part of the objections that you've laid out in objections for me to rule on?

MR. MCFARLAND: We did. I mean, they are there in the -- I think we have the objections to the use of discovery, but we don't have the Court's rulings yet.

THE COURT: Right.

MR. MCFARLAND: So, I guess what I was going to ask, do you want us to contact Magistrate Judge Leonard for him to try and hold a hearing on those and do it, or does Your Honor want to...

THE COURT: So those are part of the objections that you have before me today, correct? Yes. So that's what I'm ordering you to meet and confer about.

MR. MCFARLAND: Okay. Not just exhibits?

THE COURT: Right. Not just exhibits. Everything that's in those tables.

MR. MCFARLAND: All right.

THE COURT: All of that.

MR. MCFARLAND: And then we will come back to you and say --

THE COURT: Yes. We resolved this. This we haven't resolved.

MR. MCFARLAND: Okay.

THE COURT: Okay. Anything else?

MR. MCFARLAND: I think that does it, Your Honor.
THE COURT: Okay. Very good. All right.
MR. LASCARA: We had one clarification as to whether that included jury instructions as well.
THE COURT: Not for Wednesday. I may have you meet and confer on that, but I'm most concerned right now about the exhibits for the obvious reasons that the jury instructions come at the end.
MR. LASCARA: All right. Thank you.
THE COURT: All right. Okay.
MR. LASCARA: Thanks.
MR. MCFARLAND: I'm sorry, Your Honor, there was one more.
THE COURT: Okay.
MR. MCFARLAND: And I appreciate the Court's patience. We have -- this one trial is scheduled for eight days.
THE COURT: Yes.
MR. MCFARLAND: Does the Court intend to split that time evenly, or put parties on the clock, or are we just going to see how it goes and...
THE COURT: Do you think you will need more than eight days?
MR. MCFARLAND: No.
THE COURT: Okay.

MR. MCFARLAND: I don't from the defendants' standpoint, Your Honor.

THE COURT: Right.

MR. MCFARLAND: But eight days is eight days. I am a little concerned that the plaintiff runs -- so let me rephrase my last answer, if I may for the Court.

THE COURT: Sure.

MR. MCFARLAND: The Court has allotted eight days. If the plaintiff takes seven, that's going to be problematic for me.

THE COURT: Right.

MR. MCFARLAND: So that's why I asked, you know, does the Court intend to split it evenly 4/4, or put people on the clock with the same amount of hours, which I've seen, you know, done in longer trials? I am just -- I am concerned that the plaintiff could take five, six days, and I'm scrambling. You know, if we're only going to go eight, then I'm scrambling to try to get my evidence in, in two.

THE COURT: Understood.

Plaintiff, how long do you think you need to put your case on?

MR. LASCARA: Well, Your Honor, I think that we having the burden of proof -- and I know there are some counter claims, but they're very small and not nearly as complicated as our case. So it wouldn't surprise me that we

take five days, you know, in other words, more than half, one extra day because we have an awful lot of counts still out there. And there is eight -- how many defendants? There is a good number of defendants, so -- and we have the burden. So, to me dividing it evenly wouldn't really work or make sense, because we have so much more to do.

THE COURT: Mr. McFarland, do you think you need equal time? I mean, your counterclaims aren't the same as --

MR. MCFARLAND: No. I agree on the counterclaims, Your Honor. They could be covered very quickly. I don't know that I need equal, Your Honor, but I'm going to say it, and maybe we just wait and see how things go.

I will note for the Court that we went three days on a preliminary injunction hearing, which is maybe a little unusual. I'm just concerned, again, that we get to day six, and I still haven't started my defense. And I appreciate Mr. Lascara saying he has got the burden of proof, but justice is equal for both sides. I mean, I've got to defend a case in which they are seeking millions and millions of dollars against my, clients, Your Honor, and it's obviously very important to them --

THE COURT: Certainly.

MR. MCFARLAND: -- and I just want to make sure that we have an opportunity to do all we can for our clients

to represent them and put on a full case for the jury.

THE COURT: Right. So let me say this. I think the best thing is to let's see how it goes, but I have all sorts of creative ways to make sure that we move along.

MR. MCFARLAND: Okay.

THE COURT: So I don't think it will be a problem.

MR. MCFARLAND: Thank you, Your Honor.

THE COURT: Thank you.

Okay. Anything else?

All right. Very good. You'll be getting my order. So, you'll be getting my order to meet and confer, so I suggest you-all jump on that right away so that you can get it done, because it seems like there were a lot of objections.

Again, you know, I'll say I'm, you know, more than happy to try this. That's why I became a trial judge. But, again, like I said, it seems like in a lot of ways this is a business decision. So, I'm not really pushing you but, you know, based on what you-all said at the beginning, you know, if you think it's productive to, you know, talk some more or you need my assistance in getting back before Judge Krask, let me know that. If not, that's fine. Keep your foot on the gas, and we'll get this train on the tracks on May 31st. All right.

MR. LASCARA: Thank you, Your Honor.

MR. MCFARLAND: Thank you, Your Honor.

THE COURT: All right, Ms. Jones. Do we have anything else today?

THE CLERK: No, this is it.

THE COURT: Right. It's been a long day. All right. Let's close court.

(Court was adjourned at 3:27 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____/s/_____

Jill H. Trail

May 23, 2022